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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

JAMES VERNER, et al., *Co-Petitioner,*

vs.

BUTCHERS' UNION #127, *Respondent.*

SAFEWAY STORES, INCORPORATED, *Co-Petitioner,*

vs.

BUTCHERS' UNION #127, *Respondent.*

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Where one of two employee groups involved in a seniority dispute is not afforded an opportunity to participate in a labor arbitration, and the result greatly disfavors that group, has the arbitration award resolved the dispute in a final, binding and enforceable manner?

2. Does a union breach its duty of fair representation by asserting the interests of one of two represented groups competing in a seniority dispute where it fails to: (1) discuss the issue with any member of the second group; (2) give notice of arbitration proceedings to members of the second group; or (3) offer any evidence at arbitration supportive of the second group's interests.

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner, Safeway Stores, Incorporated[1] (hereinafter referred to as the "Company") and Petitioner James Ver-

[1]Pursuant to the Rules of this Court, the Petitioner states that the following companies are subsidiaries of Safeway Stores, Incorporated: Australian Safeway Limited; Safeway Food Stores, Limited, a United Kingdom Corporation; Safeway Holdings, Inc., a Delaware Corporation; Safeway Stores, Incorporated, of Wyoming, a Wyoming Corporation; Canada Safeway Limited, a Canadian Corporation; Canada Safeway International, Finance Corporation, a Delaware Corporation; and Safeway Supermarket Gmbh, a West German Corporation. The following companies are subsidiaries of Canada Safeway Limited, a Canadian Corporation: Lucerne Foods Limited, an Alberta Corporation; McDonald's Consolidated Limited, a Canadian Corporation and Empress Foods Limited, a British Columbian Corporation. The Petitioner is not a subsidiary of any other company.

ner respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in Case No. 79-4389 and Case No. 79-4388. Said judgment affirms a decision of the United States District Court for the Eastern District of California confirming an arbitration award.

OPINIONS BELOW

The opinion of the Court of Appeals is not, at this time, reported and appears at Appendix A, *infra*, pp.A-1 to A-4. The Memorandum and Order of the United States District Court for the Eastern District of California is not, at this time, reported and appears at Appendix B, *infra*, pp.B-1 to B-8.

JURISDICTION

The Memorandum Opinion of the Court of Appeals was filed on March 17, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the trial court was invoked pursuant to Section 301 of the Labor-Management Relations Act as amended (29 U.S.C. § 185).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 9:

§ 10

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

Most of the relevant facts in this case are set forth within the District Court's Memorandum and Order of May 15, 1979. At all times relevant to this case, the Company and Butchers' Union Local No. 127 (hereinafter referred to as the "Union") have been parties to a collective bargaining agreement which provides that arbitration shall be the exclusive means of resolving differences between them.

The Company operates a meat processing facility in Stockton, California. That plant is divided into numerous departments, three of which are relevant to this proceeding, those being the boning department, the sausage processing department and the sausage packing department. In approximately March of 1977, the Company re-

duced the employee complement within its boning department from 18 to 1, requiring the layoff of 17 employees. Later during that same year, most of these 17 employees were recalled and placed in available positions in other departments, primarily the sausage processing department and the sausage packing department. These individuals were assigned departmental seniority dates within their new departments for purposes of layoff according to the dates of their recall, as the Company understood relevant contractual provisions to require.

Thereafter, certain layoffs took place in the sausage processing and sausage packing departments. These layoffs had substantial impact on the 17 employees described above, since their departmental seniority dates afforded them far less protection than other longstanding members of those departments. The Union filed a grievance claiming that the Company had improperly established departmental seniority dates for these 17 individuals and that the above-described layoff of employees had, therefore, been improperly effectuated. The filing of this grievance quite clearly created two groups of employees whose interests were diametrically opposed. The 17 employees described above desired to have their departmental senority dates recomputed, thereby affording them greater protection against layoff. The remaining employees in the sausage processing and sausage packing departments (hereinafter referred to as the "Verner Group") obviously disfavored any such readjustment since it would necessarily reduce the relative protection against layoff enjoyed by each of them.

Despite the fact that the interests of its membership were clearly divided when this dispute arose, the Union did not solicit the view of the Verner Group before filing the above-described grievance, nor at any time after its filing. The Verner Group was not given notice of the grievance's pendency nor any of the proceedings which took place in connection with its resolution. They were not provided with an opportunity to affect determination of the Union's stance in this matter, nor were they offered any opportunity to participate directly in proceedings by which the Union's grievance was resolved. To the contrary, from the very first moment that this conflict arose, the Union adopted a stance favorable to the 17 complainants in every respect. These facts, as all of the above facts, are completely uncontroverted in the record below.

The Union's grievance was not resolved during preliminary steps of the grievance and arbitration procedure and for that reason the parties agreed to submit the matter to arbitration before Arbitrator David Karasick. Hearings were held before Arbitrator Karasick on January 27, 1978 and July 7, 1978. Following these hearings, both parties submitted written argument making reference to the evidentiary transcript. During the hearings before Arbitrator Karasick and in its written argument, the Union placed reliance upon Paragraph G of the departmental seniority provisions in the collective bargaining agreement. The Company provided testimony as to the bargaining history of that provision establishing that the clause was intended to do no more than remove any possible implication that employees recalled to serve in a new department might have to reserve a probationary period. This testimony as to bargaining history, however, was not

supported by any Union or employee spokesman, as it might have been had the Verner Group been given notice of these proceedings, thereby affording them an opportunity to participate in formulation of the Union's evidentiary case.

Arbitrator Karasick issued a written award on or about September 30, 1978, in which he elected to ignore the Company's testimony as to bargaining history and rule, on the basis of Paragraph G's literal terms, that the seniority of the 17 employees described above should be readjusted. As soon as the contents of this award became known to the Verner Group, the Company received a demand from their counsel that no steps be taken to implement the award's terms. The Verner Group specifically threatened to initiate lawsuits or other actions against the Company if it implemented the award, thereby disadvantaging that substantial group of employees.

On December 19, 1978, the Company filed a complaint to vacate the award. Shortly thereafter, the Company learned that the Verner Group filed a complaint requesting the same relief on December 18, 1978, which alleged that the Union breached its duty of fair representation toward these members during the processing of the above-described grievance. On December 26, 1978, the Company filed a notice of related cases by which it requested relation of its suit with the above-described action, denominated *James Verner v. Butchers Local No. 127 of the Amalgamated Meat Cutters and Butcher Workmen of North America* (Civil No. 78-669-PCW). In response to this notice, the presiding judge of the district court ordered

that the two actions be related and assigned to the same judge.

Upon filing its answer in this matter, the Union counterclaimed for confirmation of the award. Cross-motions for summary judgment were properly noticed and briefed. The Court heard oral argument on these motions on March 12, 1979 and orally directed that the Company's Motion for Summary Judgment be denied and that the Union's Motion for Summary Judgment be granted. Judgment was entered effectuating this order on March 21, 1979.

On April 2, 1979, the Company filed a timely motion for reconsideration pursuant to Rule 59(a) and Rule 60 of the Federal Rules of Civil Procedure. After receipt of appropriate written and oral argument, the Court issued a memoradum and order which was filed on May 15, 1979 in which it denied said motion for reconsideration. The Company filed a timely notice of appeal in the district court pursuant to Rule 3(a) and Rule 4(a) of the Rules of Appellate Procedure, by which the Company appealed from the following actions of the district court:

1. Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment dated March 20, 1979 and filed March 21, 1979.

2. Judgment dated March 20, 1979 and filed March 21, 1979.

3. Memorandum and Order Denying Plaintiff's Motion for Reconsideration under Rule 59(a) and Rule 60 of the Federal Rules of Civil Procedure dated May 15, 1979 and filed May 15, 1979.

The Verner Group also filed a timely notice of appeal in its action after the district court granted a motion for summary judgment filed on behalf of the Union in that matter. The Court of Appeals for the Ninth Circuit affirmed the district court's ruling by memorandum filed March 17, 1981.

REASONS FOR GRANTING THE WRIT

The Petitioners urge this Court to grant the instant Petition for Writ of Certiorari because: (i) the outstanding decision of the Court of Appeals produces an unfair and undesirable result, and (2) the outstanding decision of the Court of Appeals is sharply in conflict with the decision of another court of appeals. The factual situation posed by this case occurs frequently in the course of collective bargaining and guidance from this Court is needed to make certain that federal courts will respond promptly, judiciously and uniformly when litigation results.

A. The Court Of Appeals Decision Produces An Unfair And Undesirable Result

1. Any Arbitration Award Which Does Not Resolve The Underlying Dispute In A Final And Binding Fashion Is Invalid And Must Be Vacated

The standards to be applied in reviewing the decision of an arbitrator pursuant to Section 301 are controlled by federal law. See *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969); *Allendale Nursing Home, Inc. v. Local 1115, Joint Bd.*, 377 F.Supp. 1208 (S.D.N.Y. 1974). As the United States Supreme Court stated in *Textile*

Workers Union of America v. Lincoln Mills, 353 U.S. 448, 456 (1957),

> [T]he substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws.

In fashioning the standards which determine the validity of labor arbitration awards, federal courts have frequently looked to the federal law developed under the United States Arbitration Act (9 U.S.C. §§ 1-14)[2] and analogous

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[2]The Arbitration Act frequently does not have direct applicability to labor arbitration awards because of the limitation contained in 9 U.S.C. § 1 that, ". . . nothing herein contained shall apply to *contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." [Emphasis added.] Some courts have found this exclusion inapplicable to collective bargaining agreements between a union and an employer. See, e.g., *Local 205, United Electrical, Radio and Machine Workers of America v. General Electric Co.*, 233 F.2d 85, 100 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957) (Supreme Court did not deal with the subject of the Arbitration Act's applicability), wherein the court stated:

> Therefore, we hold that the exclusion in Section 1 does not embrace collective bargaining agreements, as distinguished from individual 'contracts of employment,' and that the Arbitration Act applies to collective bargaining agreements within the limits of other sections of the Act.

A competing line of cases has found this exclusion to apply to all collective bargaining agreements. See, e.g., *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1127 (3d Cir. 1969); *Tenney Engineering, Inc. v. United Electrical, Radio and Machine Workers of America, Local No. 437*, 207 F.2d 450 (3d Cir. 1953). Even courts which regard the United States Arbitration Act as generally applicable to collective bargaining agreements have held it inapplicable where the collective bargaining agreement covers employees actually engaged in the transportation industries. See *Paramount Bag Mfg. Co., Inc. v. Rubberized Novelty & Plastic Fabric Workers Union, Local 98*, 353 F.Supp. 1131 (D.C.N.Y. 1973).

state laws. See *Timken Co. v. Local Union No. 1123, United Steelworkers of America, AFL-CIO*, 482 F.2d 1012, 1014 (6th Cir. 1973); *Amanda Bent Bolt Co. v. Int'l Union, United Automobile, Aerospace, Agricultural Implement Workers of America, Local 1549*, 451 F.2d 1277, 1280 (6th Cir. 1971); *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969); *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 261 F.Supp. 832 (D.N.J. 1966).

Both the United States Arbitration Act and Part 3, Title 9 of the California Code of Civil Procedure (Arbitration) articulate precise grounds for the vacation of arbitration awards which closely parallel the considerations weighed by federal courts in reviewing such awards under § 301. In pertinent part, the federal act permits vacation of arbitration awards, "[W]here the Arbitrators exceeded their powers, or so imperfectly executed them that *a mutual final, and definite award upon the subject matter submitted was not made* [emphasis added]." Analogously, Section 1286.2 of the California Code of Civil Procedure provides for vacation of an arbitration award if the court determines that ". . . [t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted . . . ."

This statutory authority makes clear that no arbitration award is valid *unless* that arbitration award successfully resolves the underlying dispute in a final and binding manner. If the procedures utilized by the arbitrator fail to provide all interested groups with an opportunity to

present their views it is impossible for the resulting award to satisfy this statutory requirement. Such an award cannot serve as a final and binding resolution of the dispute involved because one or both parties to the arbitration are susceptible to further actions initiated by persons or parties whose interests were not considered in the arbitration. As will be seen below, the subject arbitration award is defective for precisely that reason. The Court of Appeals erred, therefore, by failing to vacate that award.

2. The Subject Arbitration Award Does Not Finally And Definitely Resolve The Controversy Submitted

The arbitration award of Arbitrator Karasick did not resolve the seniority dispute between the parties in a final and definitive manner. The seniority dispute clearly created two groups of employees whose interests were diametrically opposed. Seventeen employees claimed that they should have had a higher position on the seniority roster when they were recalled to new departments. Advancement of these 17 employees on the seniority roster in the manner demanded would clearly disadvantage all employees between the original positions of these 17 individuals on the roster and the positions to which they claimed themselves rightfully entitled. Despite the clear presence of two competing groups of employees, the Union only advanced the cause of the 17 employees on behalf of whom it filed the grievance in this case during the arbitration proceedings which gave rise to Arbitrator Karasick's award. The Verner Group was *not* provided with an opportunity to make

its views known nor were any of its interests advanced by the Union during the course of the subject arbitration proceedings. Perhaps most critical, the Verner Group was not even afforded an opportunity to meet with Union representatives and contribute toward formulation of the Union's position before it filed and pursued the grievance in this case.

Not surprisingly, the Verner Group has protested Arbitrator Karasick's award vigorously as an attempt to impermissibly dispose of their interests without their participation or effective representation. Immediately upon issuance of the award, the Verner Group demanded that the Company cease implementation of the award. A representative of that group further threatened to initiate legal proceedings if necessary against responsible parties.

There is no question that sound causes of action are currently available to the Verner Group which could effectively be brought against the Union and/or the Company. While the outcome of all suits available to that group cannot be forecast at this time, existing precedent makes clear that under the facts set forth above colorable claims are available to this group of employees which have substantial merit. The Court of Appeals erroneously ruled to the contrary in Case No. 79-4388.

These employees have already sued the Union for breach of its duty of fair representation under *Vaca v. Sipes*, 386 U.S. 171 (1967) and they could easily sue the Company under Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185. Federal courts have already recognized that such dual causes of action exists where a

union represents only one of two competing employee contingents in a seniority dispute during exhaustion of the grievance and arbitration process. *See, e.g., Butler v. Local Union 823, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 514 F.2d 442 (8th Cir. 1975); *Local 4076, United Steelworkers of America v. United Steelworkers of America, AFL-CIO,* 338 F.Supp. 1154 (W.D. Pa. 1972).

Under highly similar circumstances, the United States Court of Appeals for the Eighth Circuit recently ruled that a group of employees' rights *were* abridged and that their union thereby breached its duty of fair representation toward them. In *Smith v. Hussmann Refrigerator Co.,* 619 F.2d 1229 (8th Cir. 1979), 64 employees bid for a relatively select number of positions. The plaintiffs were among those selected by the company for the positions available. Following these events, 26 of the unsuccessful bidders filed grievances claiming that their seniority entitled them to selection for the available positions. The union processed the grievances of the most senior employees through the various steps of the grievance and arbitration procedure. It did not consult the successful bidders *before* deciding to process these grievances nor did it provide them with notice of an arbitration proceeding convened to resolve the grievances or an opportunity to participate. "The successful bidders were not invited to attend the hearing and their only representation was presented by Hussmann's foreman, Schwartz . . ." (619 F.2d at 1233). Ultimately, the arbitrator, through issuance of an initial and a supplemental decision, awarded the jobs involved to the most senior employees in the order of their seniority, thereby displacing

some of the individuals originally granted these positions by the company. The plaintiffs claim that the foregoing conduct by the union breached its duty of fair representation toward them was tried to a jury which rendered a verdict against the union and in favor of the plaintiffs. Thereafter, the district court entered judgment in the union's favor notwithstanding the verdict.

After a careful review of the jury instructions and the evidence (the Court of Appeals concluded) that the jury's verdict should have been upheld." (619 F.2d at 1235). Before reaching this conclusion, the court carefully analyzed *Vaca v. Sipes*, 386 U.S. 171 (1967), and its progeny. The court found, as is commonly recognized, that three separate standards must be applied to determine if a union has breached its duty of fair representation. As stated in *Griffin v. Int'l. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW*, 469 F.2d 181, 183 (4th Cir. 1972):

> A union must conform its behavior to each of these three separate standards. First, it must treat factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.
>
> . . . *Without any hostile* motive of discrimination and in complete good faith, a union may nevertheless pur-

sue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation.

Applying these three separate standards to the conduct of the union in the case before it, the court found that the union *exceeded* the permissible range of reasonableness by pursuing seniority grievances which were clearly to the detriment of some of its members without inviting those members to contribute toward formulation of the union's position notifying them of proceedings which affected their rights, and affording them an opportunity to participate.

In reaching this conclusion, the court specifically rejected a contention raised by the union that it should not be found culpable because the employer advanced positions at the arbitration hearing which favored the plaintiffs. The court specifically found that the employees were entitled to adequate representation *by the union* and that the union's omissions could not be corrected by employer conduct at the arbitration hearing.

The foregoing case appears to be quite applicable in the present action. The Verner Group, just as the plaintiffs in *Smith,* were originally favored by Company action. The Verner Group, just like the plaintiffs in *Smith,* adamantly opposed grievances filed by more senior employees. The Verner Group, just like the plaintiffs in *Smith,* were not provided with an opportunity to contribute toward formulation of the Union's position *before* these grievances were pursued. The Verner Group, just as the plaintiffs in *Smith,* were not provided with notice of the arbitration hearing which disposed of their rights or an opportunity

to participate. If the union's omissions in *Smith* exceeded the permissible range of reasonableness, it must be concluded that so also did the omissions of the Union in the present case.

If a Section 301 suit were brought in the present case, the Company would be subjected to prolonged litigation. If the group of employees excluded from the arbitration contested in this suit were to prevail, the Company could easily become subject to double liability arising out of the same events. Compliance with Arbitrator Karasick's award requires the Company to pay certain sums to the 17 employees on whose behalf the grievance was filed. If the Company complies with that award and it is later found invalid as a result of litigation such as that described above, the Company might well be found partially liable to the Plaintiffs for intervening layoffs handled in compliance with Arbitrator Karasick's award.

This result is clearly intolerable. The Company did all within its power to see that the award issued by Arbitrator Karasick would be final and binding in nature. Forces beyond its control have prevented that award, however, from serving as a binding resolution of the dispute between the parties. The Company is now faced with a very substantial threat of prolonged litigation and the very real possibility that it will ultimately be faced with double liability arising out of the exact same events. These facts render Arbitrator Karasick's award invalid and it should, therefore, be vacated. The Court of Appeals erred by failing to afford that relief immediately.

3. In Similar Circumstances, Federal Courts Have Uniformly Vacated Arbitration Awards And Directed Participation In A New Arbitration, Final And Binding Upon All Affected Groups

In circumstances analogous to the present case, federal courts have uniformly vacated arbitration awards and directed participation in new arbitration proceedings, final and binding upon all affected groups. Classically, arbitration awards made the subject of petitions to vacate because of their failure to finally and definitively resolve disputes have arisen in the context of jurisdictional disputes. It is not infrequent for two unions to claim that their members are entitled to perform the exact same work at a particular company facility. If both unions are signatory to collective bargaining agreements with the employer each may file a grievance claiming the disputed work and process that grievance to arbitration. Absent judicial intervention such a situation can easily result in the issuance of conflicting awards or exposure of the affected employer to prolonged litigation regarding the work assignment in question. Where such a situation has been called to the attention of federal courts, the federal judiciary has uniformly utilized the same means to prevent such an intolerable outcome. In such circumstances, outstanding awards binding upon some but not all affected groups have been vacated and *all* affected parties have been directed to participate in a single arbitration proceeding which will finally and definitively resolve the dispute in a manner binding upon all parties. Such a proceeding is generally known as a "tripartite arbitration."

The leading court of appeals case on the issue of tripartite arbitration is that of *Columbia Broadcasting System, Inc. v. American Recording and Broadcasting Association*, 414 F.2d 1326 (2d Cir. 1969), wherein the court affirmed the district court's order compelling tripartite arbitration of a work assignment dispute despite the existence of separate collective bargaining agreements, separate grievance procedures and separate demands for arbitration. The court reiterated the district court's holding:

> Compelling all three parties to the dispute to submit their grievances to the same arbitration is practicable, economical and convenient for the parties and the arbitrator. It is sound because it not only avoids duplication of effort but the possibility of conflicting awards. *Columbia Broadcasting System v. American Recording and Broadcasting Association*, 293 F.Supp. 1400, 1403 (S.N.Y. 1968); cited with approval in 414 F.2d at 1329.

Accord: *Bell Aerospace Co. v. Local 516, International Union United Automobile, Aerospace and Agricultural Implement Workers of America*, 500 F.2d 921, 923 (2d Cir. 1974); *Window Glass Cutters League of America v. American St. Gobain Corporation*, 428 F.2d 353, 355 (3d Cir. 1970); *Baltimore Typographical Union No. 12 v. Abell Co.*, 441 F.Supp. 596, 602 (D.Md. 1977); *Textile Workers Union of America v. Scottex Corp.*, 344 F.Supp. 243 (S.D.N.Y. 1972) [order vacating conflicting arbitration decisions and compelling tripartite arbitration]; *Edmos Corp. v. Textile Workers*, ... F.Supp. ....., 80 LRRM 3225 (S.D.N.Y. 1972) [order vacating conflicting jurisdictional awards and compelling tripartite arbitration], Cf., *Local 416, Sheet Metal Workers International Association v. Helgesteel Corp.*, 507

F.2d 1053, 1057-58 (7th Cir. 1974) [order vacating a bilateral arbitration award and requiring submission to a national joint board established by the union's constitutions]; *Local No. 552, United Brick and Clay Workers of America v. Hydraulic Press Brick Co.*, 371 F.Supp. 818, 825 (E.D. Miss. 1973 and 1974) [order compelling tripartite arbitration between a union with two employers]; *Metromedia v. Theatrical Stage Employees*, ... F.Supp. ....., 93 LRRM 2765 (D.C. Calif. 1976) [order vacating an earlier order requiring tripartite arbitration of a jurisdictional dispute because of intervening determination of the merits of the dispute by the National Labor Relations Board].

A comparable procedure is clearly required in the present case. The award issued by Arbitrator Karasick is not final and binding. As explained above, both the Union and the Company are now subject to a very substantial risk of prolonged litigation. That litigation could easily result in conflicting decisions or the imposition of double liability upon the Company. That award should, therefore, be vacated and new arbitration proceedings directed in which the outcome is certain to be binding upon all groups concerned. That object can easily be accomplished by directing the Union to *resubmit* the dispute involved in this case to arbitration and to agree to the utilization of procedures which will assure a full and fair opportunity for presentation of argument on behalf of both employee contingents.

B. The Court Of Appeals Decision Is In Conflict With The Decisions Of Other Courts of Appeal

As noted above, the Court of Appeals found no breach of the Union's duty of fair representation in this case

despite the fact that one of two employee groups competing in a seniority dispute: 1) had no opportunity to contribute toward formulation of the Union's position regarding that dispute, 2) received no notice of arbitration proceedings directly affecting their interests, and 3) received no opportunity to offer testimony or evidence in support of their interests at the arbitration hearing. The Courts of Appeal are divided as to whether such conduct constitutes breach of a union's duty of fair representation and thereby renders the resulting arbitration award susceptible to collateral attack. For example, in *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied.* 377 U.S. 1003 (1964), the Court of Appeals for the Seventh Circuit stated as follows:

> Petitioner contends, *inter alia*, that his rights were denied since he was not given notice of the arbitration hearing and did not appear there. We disagree. There is no statutory or constitutional right of an employee to be present at an arbitration hearing 327 F.2d 788.

By contrast, the Court of Appeals for the Eighth Circuit has held in *Smith v. Hussmann Refrigerator Co., supra,* that where two employee groups compete in a seniority dispute, the union's duty of fair representation requires it to consult each group in formulating the union's official position and give notice to each group of arbitration proceedings which will affect their interests. See also *Thompson v. Int'l Ass'n of Machinists,* 258 F.Supp. 235 (E.D. Va. 1966) and cases cited therein.

Seniority disputes occur quite frequently in the course of collective bargaining and the confusion which currently

exists regarding the conduct required of Union representatives in order to assure a proper resolution of such disputes is highly undesirable. This Court has recently recognized that important national interests favor the prompt resolution of labor disputes. See *United Parcel Service, Inc. v. Mitchell*, 49 USLW 4378 (April 20, 1981). In order to assure that seniority disputes can be promptly resolved in a manner which is not susceptible to collateral attack and does not, therefore, foster prolonged litigation, this Court should establish a clear and predictable standard regarding union representation of employee groups which compete in such disputes.

CONCLUSION

For the reasons set forth herein, the Petitioners respectfully urge this Court to grant the instant Petition for Certiorari.

Dated: June 15, 1981.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY
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(Appendices follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

JAMES VERNER, et al., v. Plaintiffs-Appellants, BUTCHERS' UNION #127, Defendant-Appellee.	No. 79-4388
SAFEWAY STORES, INC., Plaintiff-Appellant, v. BUTCHERS' UNION #127, Defendant-Appellee.	No. 79-4389

MEMORANDUM

Appeal from the United States District Court
for the Eastern District of California

Philip C. Wilkins, District Judge, Presiding

[Filed March 17, 1981]

Before: KENNEDY and FARRIS, Circuit Judges, and PECKHAM,* District Judge

STATEMENT OF FACTS

At Safeway's Meat Processing Plant, Safeway ceased its boning operations and laid off 17 employees who per-

*Honorable Robert F. Peckham, Chief United States District Judge for the Northern District of California, sitting by designation.

formed the boning functions. When these employees were subsequently recalled to work in other departments, a dispute arose regarding the method of calculating their departmental seniority. The arbitrator ruled in favor of the Union which had advanced the cause of the exboning department employees. James Verner and 52 other employees who claim to have been adversely affected by the arbitrator's decision, filed suit seeking vacation of the arbitration award on the grounds that the Union had violated its duty of fair representation. Safeway also filed suit, seeking a vacation of the award on the ground that it did not finally resolve the dispute. The trial court granted summary judgment in favor of the Union in both actions; we affirm.

DISCUSSION

There is no merit to the Verner group's contention that the Union, in processing the grievances of the 17 exboning department employees, breached their duty of fair representation. "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member . . . is arbitrary, discriminatory and in bad faith." *Vaca v. Sipes,* 386 U.S. 171 (1967). The group did not even allege that the Union acted arbitrarily or discriminatorily. Nor does the record reflect such conduct. Indeed, the plain meaning of § G of the collective bargaining agreement supports the position advanced by the Union.

Moreover, the mere failure of the Union to prosecute the grievances of the Verner group does not state a breach of the duty of fair representation. *Humphrey v. Moore,* 375 U.S. 355 (1964). There is no showing that the Union acted

in reckless disregard of the rights of the Verner group in failing to prosecute their grievance after the arbitrator issued his ruling, *Ness v. Safeway Stores, Inc.*, 578 F.2d 558 (9th Cir. 1979), as the bar of finality precluded the Union from processing any grievances on the same subject matter. Moreover, any conduct of the Union occurring after the arbitrator had ruled would not mandate a vacation of the award, the only relief prayed for in the complaint, as such conduct could not have tainted the award.

Furthermore, *Smith v. Hussman*, 619 F.2d 1229 (8th Cir. 1980) does not support the Verner group's contentions. *Hussman*, to the extent that it is relevant, teaches that the Union, in seniority disputes, should support those employees whose position is substantiated by the terms of the collective bargaining agreement. It is quite clear here that the literal terms of § G supported the grievance of the 17 exboning department employees.

Regarding Safeway's argument that the arbitration award should be vacated because it does not finally resolve the dispute, we note that *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976) permits an employee, who proves that the Union breached its duty of fair representation and that this breach tainted the decision of the arbitrator, to bring an action against the employer. Since we hold that no such breach occurred, the Verner group has no remedy against Safeway. The bar of finality therefore remains in place and no further arbitration upon this subject matter may occur. The bar of finality of the arbitrator's award is not lifted merely upon the presence of a claim against the Union. Thus, as we conclude that the arbitrator's award

finally resolved the dispute, we do not reach Safeway's argument that the Arbitration Act applies, for purposes of review, to collective bargaining agreements.

Moreover, the arbitration award, on its face, represents a plausible interpretation of the collective bargaining agreement; the language of § G supports the decision that the 17 grievants were entitled to have their departmental seniority determined on the basis of their plant seniority. Further judicial inquiry, therefore, is unwarranted, and the award must be affirmed. *Riverboat Casino Inc. v. Local Joint Executive Board of Las Vegas,* 575 F.2d 251 (9th Cir. 1978).

The ruling of the district court is hereby affirmed.

Appendix B

In the United States District Court
for the Eastern District of California

Civil No. S-78-670-PCW

(Related with Civil No. S-78-669-PCW)

Safeway Stores, Incorporated,
Plaintiff,

v.

Butchers Union Local No. 127 of the Amalgamated Meat Cutters and Butchers Workmen of North America,
Defendant.

[Filed May 15, 1979]

MEMORANDUM AND ORDER

Plaintiff Safeway Stores, Incorporated (hereinafter Safeway) has moved, pursuant to Rule 59(e) and Rule 60 of the Federal Rules of Civil Procedure, for reconsideration of this Court's Order of March 12, 1979 granting summary judgment to defendant Butchers' Union Local No. 127. Based on the following discussion and reasoning, the court declines to relieve plaintiff from the judgment and hereby confirms its earlier order.

Judgment was entered on March 21, 1979. Since March 31, 1979 fell on a Saturday, the ten day period within which to file under Rule 59(e) ended on April 2, 1979. See

Rule 6(a) of the Federal Rules of Civil Procedure. The instant motion, filed on April 2, 1979 was, therefore, timely filed.

This motion to reconsider is based on a recent Eighth Circuit decision, *Smith v. Hussmann Refrigerator Co.*, ... F.2d ....., 100 LRRM 2238 (8th Cir. 1979), which plaintiff contends had been released at the time of argument in the instant action but not yet published.

Background

The facts of this action are fairly straightforward. Safeway Stores, Incorporated (hereinafter Safeway) and the Butchers' Union Local No. 127 of the Amalgamated Meat Cutters and Butchers Workmen of North America (hereinafter Local 127) are parties to a written collective bargaining agreement effective October 1, 1976 through October 1, 1979.

On March 25, 1977, Safeway stopped boning carcass beef at its Stockton meat processing plant, apparently on the basis that it could more cheaply bring in meat already boned elsewhere. Seventeen of the eighteen employees of the Boning Department were laid off. Some of these individuals had had many years of employment with Safeway.

In May and June of 1977, most of these employees were called back and placed in available vacancies in other departments, primarily the Sausage Processing Department and the Sausage Packing Department. These employees were assigned seniority dates in the departments determined by the dates of their employment starts in the

new departments rather than by the dates of their first employment at Safeway; i.e., plant seniority.

In September of 1977, certain layoffs were required in the Sausage Processing and Sausage Packing Departments. These layoffs were effectuated in accord with the department seniority (as determined by the dates of their employment starts in those departments) of the employees. The layoffs thus fell most heavily upon those employees newly transferred from the Stockton boning department.

Local 127 then filed a grievance against the manner in which the "Boning Seventeen" employees were assigned departmental seniority in their new departments. The union contended that the Boning Department was closed within the meaning of ¶ G of the Departmental Seniority provisions of the Collective Bargaining Agreement. This subsection provides:

> In the event of the closing of any of the above departments, employees transferred to another department will immediately establish their department seniority based upon their plant seniority.[1]

Furthermore, the union took the position that ¶ D of the Departmental Seniority Provisions of the Collective Bargaining Agreement merely states that department seniority applies in the case of a layoff but that it does not govern how such seniority is established in the event

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[1]Collective Bargaining Agreement between Safeway Stores, Incorporated and the Butchers' Union, Local No. 127 of the Amalgamated Meat Cutters & Butcher Workmen of North America (signed March 4, 1977) Article X, Departmental Seniority at 18, ¶ G.

that a transfer occurs because a department is closed. Paragraph D provides:

> Department seniority shall prevail at all times in matters concerning promotions, if qualified, layoffs, rehiring, vacations, shift preference, job bidding and overtime.[2]

Safeway, on the other hand, argued that the department seniority should be determined by the date of the employment start in the department rather than the date of the employment start at Safeway.

In order to resolve the issue of whether the date of the department employment start or the date of the plant employment start should govern in this situation, Safeway and Local 127 submitted the dispute to an arbitrator. Arbitration hearings were held on January 27, 1978 and on July 7, 1978, pursuant to the grievance and arbitration procedure for the resolution of "any dispute that may arise as to the interpretation"[3] of the collective bargaining agreement.

As a result of the arbitration proceeding, the arbitrator found that the one employee who had not been laid off from the Boning Department was in fact working on the loading dock and that the Boning Department was "closed" within the meaning and intent of ¶ G of the Departmental Seniority Provisions of the Collective Bargaining Agreement. The arbitrator further stated that ¶ G was clear and unambiguous and that no parol evidence was required.

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[2]Id, ¶ D.

[3]Collective Bargaining Agreement, supra, Article XI, Grievance and Arbitration at 22.

In September, 1978, the arbitrator rendered his opinion and award directing that the "Boning Seventeen" employees be granted seniority in their new departments dating from the time each became a permanent employee at Safeway. The arbitrator further directed reinstatement, as well as back pay, for those entitled to such reinstatement as a result of the newly computed departmental seniority dates.

Thereafter, Safeway received a telegram from a representative of the fifty-three employees who would be bumped lower on the seniority ladder within their departments as a result of the arbitrator's award. The telegram threatened legal action against responsible parties should implementation of the decision continue.

The union alleges that it asked the arbitrator, in writing, to resume the hearing on the balance of the remedial aspects under the award because Safeway was delaying the preparation of make-whole computations. The union states that Safeway then notified the arbitrator in writing that it no longer recognized the arbitrator's jurisdiction.

On December 18, 1978, James Verner, one of the original employees in the affected departments, filed an action in this court against Local No. 127, seeking to vacate the arbitration award on the basis of a breach of the union's duty of fair representation.

The instant action was filed on December 19, 1979 by Safeway seeking to vacate the arbitrator's award on the grounds that the arbitrator exceeded his powers and in other respects so imperfectly executed them that a final and definite award was not made pursuant to the contract be-

tween the parties. Jurisdiction was based upon § 301 of the Labor Management Relations Act of 1947, 29 U.S.C., § 185.

On January 10, 1979, defendant filed an answer and counterclaim seeking an order confirming the arbitrator's award and granting attorney's fees to the defendant.

Both plaintiff and defendant subsequently moved for summary judgment; said motions were heard at the court's March 12, 1979 Law and Motion Calendar.

Discussion

The role of the court in reviewing the validity of an arbitration award under a collective bargaining agreement is an extremely narrow one. Amalgamated Meat Cutters v. Cross Brothers Meat Packers, Inc., 518 F.2d 1113 (3d Cir. 1975). The court may not substitute its judgment for that of the arbitrator. "A court must affirm an arbitrator's award if it 'can in any rational way be derived from the agreement' [citation omitted] and can only reverse if 'there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop.' Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969)." C.P. Equipment Co. v. International Association of Machinists, 415 F.Supp. 881, 882 (W.D. Pa. 1976).

"[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator." Steelworkers v. Enterprise Corp. 363 U.S. 593 (1960). The fact that a different construction is possible does not empower a court to vacate the award. In the instant case, the construction given the agreement by the arbitrator is not an

irrational one; therefore, the arbitrator did not act beyond his authority.

Furthermore, the union did not breach its duty of fair representation. Local No. 127 took a reasonable, good faith position adverse to some employees and in favor of others in the grievance procedure concerning the seniority dispute. *See Humphrey v. Moore*, 375 U.S. 335 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

Safeway further argued that the arbitrator's jurisdiction expired thirty days after the award. This argument is without merit. The award stated that "[j]urisdiction will be retained until such time as both parties inform the undersigned, in writing, that there has been full compliance with the terms of this Award"[4] and that "[e]ach of the parties shall notify the undersigned, in writing, within thirty (30) days of the date of this Award what progress has been made in complying with its terms."[5]

Since the arbitrator's award did "draw its essence" from the collective bargaining agreement, it must be enforced. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

For these reasons, then, the Court granted summary judgment in favor of defendant Local 127 and against plaintiff Safeway. The Court, however, denied defendant's request for attorney's fees.

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[4]Opinion and Award of David Karasick, Arbitrator (Exhibit D to Complaint) at 14.

[5]Id.

The case cited by plaintiff in support of his motion to reconsider, *Smith v. Hussmann Refrigerator Co.*, ... F.2d ....., 100 LRRM 2238 (8th Cir. 1979), does not justify the relief requested.

IT IS THEREFORE ORDERED that this Court's order, entered on March 1, 1979, be and the same is, hereby confirmed.

Dated: May 15, 1979

/s/ PHILIP C. WILKINS

United States District Judge

Office-Supreme Court, U.S.
FILED
JUL 10
ALEXANDER L. STEVAS,
CLERK

No. 80-2132

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES VERNER, et al.,
Co-Petitioner,

vs.

BUTCHERS' UNION #127,
Respondent.

SAFEWAY STORES, INCORPORATED,
Co-Petitioner,

vs.

BUTCHERS' UNION #127,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Respondent Butchers' Union Local #127 in Opposition to Petition

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193

QUESTIONS PRESENTED

1. Did the Union breach its duty of fair representation in pursuing a grievance that was based on the plain meaning of a seniority provision in a collective bargaining agreement?

2. Is an employer entitled to have a court set aside an arbitration award simply because one or more employees have filed a suit against the Union only for alleged breach of the duty of fair representation?

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No. 80-2132

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES VERNER, et al.,
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vs.

BUTCHERS' UNION #127,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Respondent Butchers' Union Local #127 in Opposition to Petition

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Respondent Butchers Union #127[1] (hereinafter the "Union") opposes the joint petition for writ of certiorari heretofore filed by Safeway Stores, Incorporated (here-

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1. Except as set forth in footnote 1 of the Petition, all parties are named in the caption.

after the "Company") and by James Verner, who seek a writ to review a judgment of the United States Court of Appeals for the Ninth Circuit in Case No. 79-4388 and Case No. 79-4389. Contrary to the Petition, Pet. p. 2, the judgment of the Ninth Circuit affirmed two (2) decisions of the United States District Court for the Eastern District of California, one of which held that the Union had not breached its duty of fair representation in the handling of a grievance and the other confirmed an arbitration award in favor of the Union.

OPINIONS BELOW

The opinion of the Court of Appeals is not, at this time, reported and appears at Appendix A to the Petition. No petition for rehearing was filed in the Court of Appeals.

As to the action brought by the Company, the Memorandum and Order of the United States District Court for the Eastern District of California is not, at this time, reported and appears at Appendix B to the Petition.

The joint Petition, however, does not attach the Memorandum and Order of the same District Court as to the action brought by James Verner, as required by Rule 21.1(k). It too is unreported at this time, and a copy appears at Appendix A to this Brief in Opposition, infra, pp. A-1 to A-9.

JURISDICTION

The Memorandum Opinion of the Court of Appeals was filed on March 17, 1981. The Petition for Writ of Certiorari was received by Respondent on June 16, 1981. Jurisdiction in this Court is claimed by Petitioners under 28 U.S.C. § 1254(1). Jurisdiction in the trial court lay under § 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185.

STATUTORY PROVISIONS INVOLVED

§ 301(a), Labor-Management Relations Act, as amended, 29 U.S.C. § 185(a):

> "Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

COUNTERSTATEMENT OF THE CASE

The Petitioner Company has a meat processing plant in Stockton, California. The plant is set up in various "departments" according to functions performed. These departments are recognized in the collective bargaining agreement which provides that seniority can be established on the basis of Plant Seniority, Department Seniority and Classification Seniority.

On March 25, 1977, the Company ceased operating its Boning Department wherein carcass beef had been boned. It began to import already boned meat. As a result of the closing of the Boning Department, 17 employees, some with long years of employment with the Company, were laid off. These employees did not "bump" some other employees with less seniority into layoff status.

Gradually, on various dates in May and June, 1977, most of the 17 laid off boners were brought back by Safeway and transferred into vacancies in other departments at the Company. The Company established the department seniority for these employees not on the basis of their dates of first employment with the Company but only as of the dates they went to work in these other departments in May and June, 1977.

Then, on or about September 17, 1977, Safeway went through yet another layoff, and these former boners, because of their relatively new seniority in the other departments, were among those first laid off.

The Union then filed a grievance with the Company based primarily on a certain provision in the collective bargaining agreement. Section "G" of the provision on Department Seniority provided:

> "G. In the event of the *closing* of any of the above departments, Employees transferred to another department will immediately establish their department seniority *based upon their plant seniority.*" (Emphasis added)

In the opinion of the Union there was a genuine question of whether (i) the Boning Department had been "closed" within the meaning of Section G and (ii) the employees who were transferred into vacancies in other departments should have had their department seniority established only from the day they were so transferred, or "based upon their plant seniority", i.e. from the day they were first employed. The plain language of "G" seemed to suggest to the Union the latter.

The grievance was put before Arbitrator David Karasick on January 27, 1978, and the hearing was completed on July 7, 1978. Mr. Karasick, a highly respected labor arbitrator, was chosen by the Union and the Company pursuant to the grievance and arbitration provisions of the collective bargaining agreement. That provision, in typical language, mandates the parties to resolve by arbitration any dispute as to the "interpretation" of the agreement. The arbitrator is similarly empowered to interpret the agreement.

At the arbitration, oral and documentary evidence was taken. The Union recognized that if it were successful, the

arbitration would result in the rearranging of the relative seniority status of at least some employees. The experienced arbitrator also recognized this truism of seniority cases. He had before him as an exhibit the very seniority list itself, showing the relative standing of the employees. The Company argued, inter alia, that the Boning Department had not been "closed". It also argued that the Union had withdrawn from collective bargaining a provision, entitled "Right to Displace", because the members had not wanted a "bumping" provision. The Company argued that what the Union sought in the arbitration was a form of bumping. The Union responded to all the arguments. It admitted that the "Right to Displace" proposal had been withdrawn; but that Section G *was* in the agreement, did not directly involve bumping but was limited to those transferring into vacancies, and was aimed at a narrow and peculiar set of circumstances where an entire department was closed and many veteran employees transferred to other departments.

The Arbitrator's Award issued on September 20, 1978. The Arbitrator ruled in favor of the Union, finding that the Boning Department had been "closed" within the meaning of Section G and that the former Boning Department employees had been entitled upon transferring into vacancies in other departments to have their seniority in those departments fixed "based upon their plant seniority". Indeed the Arbitrator found Section G "to be clear and unambiguous and therefore would require no parole evidence to explain its meaning".

After the Award issued, the Company set about complying with the Award by recalculating the relative seniority and reinstating those previously laid off. The Company then chose to lay off other employees. The Petitioner, Mr.

Verner, was among those then laid off. At this point Mr. Verner tried to get the Union to process a grievance going in the opposite direction and against what the Arbitrator had just found to be the clear and unambiguous language of the agreement. Mr. Verner, it is said, then issued a threat to the Company that it should not follow the Award, and the Company immediately obliged and ceased complying with the Award and henceforward supported Mr. Verner's litigation.

The Verner Action:

The action by Mr. Verner was begun by a "Complaint to Vacate Arbitration Award and to Compel Tripartite Arbitration" filed December 18, 1978, and attached to which was a copy of the collective bargaining agreement and a copy of the Award of the Arbitrator.

A first claim sought to vacate the Award, alleging that Mr. Verner and others were denied the opportunity to participate in the arbitration and that he and others had sought aid and assistance from the Union to no avail. The second claim sought to compel what is labelled as "tripartite arbitration" so that Mr. Verner and unnamed others could participate as a third party in new arbitration proceedings.

On January 15, 1979, the Union filed a Motion to Strike Doe Defendants, to Dismiss, or Alternatively, for Summary Judgment. The motion was accompanied by an affidavit to which were attached (i) the entire reporter's transcripts of the arbitration; (ii) all the Union and Company exhibits at the arbitration; (iii) the Union's brief to the Arbitrator; and (iv) the brief of the Company to the Arbitrator. Essentially, the motion thus laid the entire arbitration process before the Court and challenged Mr. Verner to come forward with "significant probative evi-

dence tending to support the complaint". *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-90, 88 S. Ct. 1575 (1968). Petitioner Verner filed an opposition including an affidavit of Mr. Verner.

On March 12, 1979, the District Court made its Order granting the Union's motion for summary judgment. Thereafter, Petitioner Verner filed a Motion for Reconsideration, and after additional briefing the District Court on May 16, 1979, issued its written Memorandum and Order (infra, App. A, A-1 to A-9).

The Safeway Action:

On the day after the filing of the action by Mr. Verner, the Company filed a "Complaint to Vacate Labor Arbitrator's Award". The action was formally related to the action of Mr. Verner by an order of the District Court. The Union answered, and it counterclaimed, seeking confirmation of the Award and an order directing the Company to complete the arbitral process insofar as the Company was obligated to pay substantial backpay. Cross motions for summary judgment were filed by the Company and the Union. The Union initially challenged the standing of the Company to raise the issue of fair representation. The Company denied it was trying to allege that the Union breached that duty and insisted it was only trying to avoid conflicting liabilities. The Company opposed the Union's demand to complete the arbitral process on the alleged basis that the jurisdiction of the Arbitrator had expired. The District Court denied the Company's motion and granted the motion of the Union on its counterclaim. Judgment was entered on March 21, 1979.

Thereafter, on April 2, 1979, the Company also filed a Motion for Reconsideration. After further briefing the District Court made its Memorandum and Order denying reconsideration (Pet., App. B, B-1 to B-8).

Both the Company and Mr. Verner appealed. After briefing, the Ninth Circuit entered an order consolidating both appeals for purposes of argument and disposition. On March 17, 1981, the Ninth Circuit filed its Memorandum Opinion affirming both decisions of the District Court in favor of the Union.

ARGUMENT

Petitioners urge this Court to grant the Petition because the decision of the Court of Appeals produces "an unfair and undesirable result", Pet., p. 8, and is allegedly in conflict with a decision of another court of appeals, *Ibid.*. The former is not a stated basis under Rule 17 for granting a petition. Further, the decision below is not in conflict with the decision of another circuit and raises no new and important issue requiring consideration by this Court. Indeed, the decision below is squarely within the mainstream of prior decisions of this Court and the Petition represents nothing more than an assault on those principles.

A. The Verner Group Presents No Conflict Among the Circuits Or Other Accepted Reason For Granting the Writ.

In *Hines v. Anchor Motor Freight,* 424 U.S. 554, 96 S.Ct. 1048 (1976), this Court held that an employer can enjoy the finality of an arbitration award in its favor unless and until a complaining grievant can show that the grievant's union breached its duty of fair representation and that this breach contributed in some way to an erroneous arbitration award.

The District Court, and the Court of Appeals, correctly found that Verner failed to prove a breach of the duty of fair representation. A breach of that duty occurs when the union's conduct towards its member is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 190, 87 S.Ct. 903 (1967). Petitioner Verner neither pleaded

nor produced any evidence to show such a breach. Specifically, Petitioner Verner could not come forward with one argument or even one piece of evidence that had not already been made and put in evidence in the course of the arbitration proceedings. The Arbitrator ultimately found that the Union's position on the grievance was supported by the plain meaning of § G of the collective bargaining agreement. The Court of Appeals was thus correct in holding that the Union did not breach its duty of fair representation when it simply championed the plain meaning of the collective bargaining agreement; nor did the Union breach that duty when it refused subsequently to prosecute for Mr. Verner a grievance going in the diametrically opposite direction. If the Court of Appeals misapprehended the factual record, no petition for rehearing was filed to attempt a correction.

In this Court in its Petition Verner continues to complain that he had no opportunity to contribute toward formulation of the Union's position in arbitration, received no notice of the arbitration, and received no opportunity to offer testimony or evidence (Pet. p. 20). Again, Verner fails totally to say what he would have contributed or what testimony or evidence he would have had to give.

Despite even now having no specific evidence or argument to show why the award was wrong, Verner claims there is a requirement of advance notice to other groups of employees whose seniority interests might be affected by a pending arbitration (Pet. p. 20). Verner claims there is a conflict in the circuits and cites the Eighth Circuit's en banc decision in *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229 (1979). *Smith* simply does not support Verner. Verner first fails to call the Court's attention to the subsequent clarification order of the Eighth Circuit, issued after a

petition for rehearing on its en banc decision, wherein the majority held the evidence in fact failed to show a breach of the duty of fair representation by the Union advocating the promotion of more senior employees. 619 F.2d 1253. To the extent *Smith* talked of the need for notice at all, it was only as a product of a much more fact-sensitive analysis of possible prejudice from a lack of notice, and even *Smith* recognized that in seniority disputes the union may take a position in favor of one group on the basis of an informed, reasoned judgment regarding the merits of the claims in terms of the language of the collective bargaining agreement. 619 F.2d at 1237. The Union did just that in this instance where it supported nothing more than the plain meaning of § G of the agreement.

The complete satisfaction of all who are represented by a union is hardly to be expected, and a union in serving all whom it represents is entitled to a wide range of reasonableness, subject to good faith and honesty of purpose. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681 (1953). Mr. Verner did not support his dissatisfaction with any such showing of bad faith or dishonesty of purpose.

B. Safeway Neither Asserts a Conflict Among the Circuits Nor Otherwise Presents a Reason For Granting the Writ.

Safeway sought below to vacate the Arbitrator's Award. There was no question, however, that the Award drew "its essence" from the collective bargaining agreement and had to be confirmed, as the Union's counterclaim requested. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358 (1960). Safeway's Petition for a Writ of Certiorari does not contest this fundamental principle for the judicial review of arbitration awards.

Safeway wanted to set aside the Award simply because the Verner group filed a suit against the Union for breach

of the duty of fair representation. Because of the pendency of the Verner suit, Safeway says, the Award did not resolve the labor dispute in a final and binding manner. That argument, as the District Court and Court of Appeals properly perceived, is directly contrary to this Court's teaching in *Hines v. Anchor Motor Freight, supra*. It is only *after* the breach of the duty of fair representation has been established that the bar of finality attaching to an arbitration award is lifted. It is to be noted that Petitioner Safeway does not even cite this Court to *Hines* in its Petition; and, its Petition is in fact structured to ignore the teaching of *Hines*. Presumably, if Safeway had *won* the arbitration and was now faced with a suit by the 17 employees the Union had represented, it would be more than happy to rely on *Hines*.

In this Court, Safeway continues to claim that it faces unnamed causes of action from the Verner group. Pet. p. 12. The Court of Appeals correctly rejected this same opportunism and held that since no breach of the duty of fair representation occurred, the bar of finality protected Safeway from suit by Verner. So too, since the Arbitrator's award did finally resolve the issue put to him, there is no need for this Court to assay what differences, if any, the U.S. Arbitration Act would have on *Hines*. There is an open question as to that Act's applicability to collective bargaining agreements. This case does not present the need to resolve that issue.

Finally, Petitioners would have this Court decide whether an undescribed procedure "comparable" to tripartite arbitration is an appropriate remedy, Pet. pp. 17-19. Since no remedy beyond denial of the Petition is required, this is not the case to examine such a novel idea which is solely a product of a line of a few cases from the Second Circuit limited to the resolution of jurisdictional disputes.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Executed at San Francisco, California, this 8th day of July, 1981.

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Attorneys for Respondent
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Appendix follows

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil S-78-669-PCW

(Related with Civil No. S-78-670-PCW)

JAMES H. VERNER, et al.,
Plaintiff,

vs.

BUTCHERS' UNION No. 127, et al.,
Defendant.

[Filed May 16, 1979]

MEMORANDUM AND ORDER

Plaintiff James Verner has moved for reconsideration of this court's order granting summary judgment to defendant Butchers' Union Local No. 127. Based on the following discussion and reasoning, the court declines to relieve plaintiff from the judgment and hereby confirms its earlier order.

The judgment was entered on March 13, 1979. Plaintiff Verner's instant motion was filed on April 4, 1979, after the ten day period allowed by Rule 59(e) of the Federal Rules of Civil Procedure. The court is not permitted to extend the time within which to file a Rule 59(e) motion. Rule 6(b) of the Federal Rules of Civil Procedure.

On April 13, 1979, plaintiff Verner noticed an appeal of the judgment to the Ninth Circuit Court of Appeals. During the pendency of an appeal, the district court may consider a motion brought pursuant to Rule 60(b) and may deny said motion although the district court cannot, until there has been a remand, grant the motion. *See Canadian Ingersoll-Rand Co. v. Peterson Products of San Mateo*, 350 F.2d 18 (9th Cir. 1965).

Plaintiff apparently seeks relief from the judgment under Rule 60(b)(6); i.e., relief for a reason not listed in Rule 60(b)(1)-(5). The motion to reconsider is based on a recent Eighth Circuit decision, *Smith v. Hussmann Refrigerator Co,.* ..... F.2d ....., 100 LRRM 2238 (8th Cir. 1979).

Background

The facts of this action are fairly straightforward. Safeway Stores, Incorporated (hereinafter Safeway) and the Butchers' Union Local No. 127 of the Amalgamated Meat Cutters and Butcher Workmen of North America (hereinafter Local 127) are parties to a written collective bargaining agreement effective October 1, 1976 through October 1, 1979.

On March 25, 1977, Safeway stopped boning carcass beef at its Stockton meat processing plant, apparently on the basis that it could more cheaply bring in meat already boned elsewhere. Seventeen of the eighteen employees of the Boning Department were laid off. Some of these individuals had had many years of employment with Safeway.

In May and June of 1977, most of these employees were called back and placed in available vacancies in other departments, primarily the Sausage Processing Department and the Sausage Packing Department. These employees were assigned seniority dates in the departments determined by the dates of their employment starts in the new departments rather than by the dates of their first employment at Safeway; i.e., plant seniority.

In September of 1977, certain layoffs were required in the Sausage Processing and Sausage Packing Departments. These layoffs were effectuated in accord with the department seniority (as determined by the dates of their employment starts in those departments) of the employees. The

layoffs thus fell most heavily upon those employees newly transferred from the Stockton boning department.

Local 127 then filed a grievance against the manner in which the "Boning Seventeen" employees had been assigned departmental seniority in their new departments. The union contended that the Boning Department was closed within the meaning of ¶ G of the Departmental Seniority provisions of the Collective Bargaining Agreement. This subsection provides:

> In the event of the closing of any of the above departments, employees transferred to another department will immediately establish their department seniority based upon their plant seniority.[1]

Furthermore, the union took the position that ¶ D of the Departmental Seniority Provisions of the Collective Bargaining Agreement merely states that department seniority applies in the case of a layoff but that it does not govern how such seniority is established in the event that a transfer occurs because a department is closed. Paragraph D provides:

> Department seniority shall prevail at all times in matters concerning promotions, if qualified, layoffs, rehiring, vacations, shift preference, job bidding and overtime.[2]

Safeway, on the other hand, argued that the department seniority should be determined by the date of the employment start in the department rather than the date of the employment start at Safeway.

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1. Collective Bargaining Agreement between Safeway Stores, Incorporated and the Butchers' Union, Local No. 127 of the Amalgamated Meat Cutters & Butcher Workmen of North America (signed March 4, 1977), Article X, Departmental Seniority at 18, ¶ G.

2. *Id*, ¶ D.

In order to resolve the issue of whether the date of the department employment start or the date of the plant employment start should govern in this situation, Safeway and Local 127 submitted the dispute to an arbitrator. Arbitration hearings were held on January 27, 1978 and on July 7, 1978, pursuant to the grievance and arbitration procedure for the resolution of "any dispute that may arise as to the interpretation"[3] of the collective bargaining agreement.

As a result of the arbitration proceeding, the arbitrator found that the one employee who had not been laid off from the Boning Department was in fact working on the loading dock and that the Boning Department was "closed" within the meaning and intent of ¶ G of the Departmental Seniority Provisions of the Collective Bargaining Agreement. The arbitrator further stated ¶ G was clear and unambiguous and that no parol evidence was required.

In September, 1978 the arbitrator rendered his opinion and award directing that the "Boning Seventeen" employees be granted seniority in their new departments dating from the time each became a permanent employee at Safeway. The arbitrator further directed reinstatement, as well as back pay, for those entitled to such reinstatement as a result of the newly computed departmental seniority dates.

Plaintiff James H. Verner is one of the fifty-three employees who would be bumped lower on the seniority ladder within their departments as a result of the arbitrator's award.

On December 18, 1978, plaintiff Verner filed the instant action seeking to vacate the arbitration award and to compel

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3. Collective Bargaining Agreement, *supra*, Article XI, Grievance and Arbitration at 22.

tripartite arbitration between Safeway, his group of employees and the boning employees. Jurisdiction of the suit was claimed on the basis of § 301 of the Labor Management Relations Act of 1947, (29 U.S.C. § 185). Plaintiff alleges that he was not afforded an opportunity to participate in the proceeding before the arbitrator and was not fairly represented by the union.

Defendant Local 127 subsequently moved to strike the Doe defendants and to dismiss, or in the alternative, for summary judgment. These motions were heard at the court's March 12, 1979 Law and Motion Calendar.

Discussion

Jurisdiction—Courts do not have jurisdiction under § 301 of the Labor Management Relations Act over an action alleging a union's breach of the duty of fair representation unless there is an allegation that there was a breach of the labor contract. *Mumford v. Glover,* 503 F.2d 878, 882 (5th Cir. 1974). There is no such allegation here.

If there is no alleged breach of a collective bargaining agreement involved, federal jurisdiction may, however, be asserted, in duty of fair representation cases against a union, under 28 U.S.C. § 1337, which grants federal courts power to hear all cases arising under congressional acts regulating commerce. *Smith v. Local 25, Sheetmetal Workers International Association,* 500 F.2d 741 (5th Cir. 1974). The National Labor Relations Act is such an act. *Capital Service v. NLRB,* 347 U.S. 501, 504 (1954). Therefore, jurisdiction over this action is proper.

Class Action—At one point, the instant complaint refers to "a class of employees adversely affected and without representation."[4] An action cannot be deemed a class action

4. Complaint at 8, l. 18-19.

unless shown to be such by the complaint. *United States v. Preston*, 352 F.2d 352, 356 (9th Cir. 1965). Rule 124 of the Local Rules of Practice for the Eastern District of California sets forth the special requirements for filing a class action complaint. Since these requirements were not met here, the action was not treated as a class action.

Doe Defendants—There is no provision in the Federal Statutes nor in the Federal Rules of Civil Procedure for the use of fictitious parties. *See Craig v. United States*, 413 F.2d 854 (9th Cir. 1969). The proper method of adding new parties in the federal courts is found in Rule 15 of the Federal Rules of Civil Procedure. The motion to dismiss the Doe defendants was therefore granted.

Duty of Fair Representation—The duty of fair representation is a statutory duty implied from the grant to the union by section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), of exclusive power to represent all employees of the collective bargaining unit. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). As the exclusive bargaining representative, the union must represent fairly employees both in its collective bargaining and in its enforcement of the resulting collective bargaining agreement. *Vaca, supra* at 176. A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca, supra* at 190.

Pursuant to *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), the arbitration award may be set aside, if the union breached its duty of fair representation.

The union here points out that it disclosed to the arbitrator that the grievance, if successful, would advance the seniority status of some employees ahead of that of others. The union also contends that the interpretation sought by

the union may eventually assist the "Verner" employees if their Department is closed and they are transferred to vacancies in other departments. Furthermore, the union points out that there is nothing in the record to show any arguments which could have been made on behalf of the complaining employees which were not made on their behalf.

In *Humphrey v. Moore*, 375 U.S. 335 (1964), the Supreme Court stated:

> [W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. In *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953), the Court found no breach of duty by the union in agreeing to an amendment of an existing collective bargaining contract, granting enhanced seniority to a particular group of employees and resulting in layoffs which otherwise would not have occurred. 'Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. . . .' [citation omitted]. Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." *Humphrey v. Moore, supra* at 349.

There is nothing to show discrimination or hostility in the decision of the union in the instant case to process the grievances of the "Boning Seventeen" nor in the representation of the union during the arbitration proceedings. The arbitrator determined that the agreement in regard to employees from the closed departments was clear and unambiguous and that no parol evidence was needed to determine the meaning of ¶ G.

For these reasons, then, the Court granted summary judgment to defendant Local 127.

The case cited by plaintiff in support of his motion to reconsider, *Smith v. Hussmann Refrigerator Co.*, ... F.2d ...., 100 LRRM 2238 (8th Cir. 1979), does not justify the relief requested. That case involved the weighing of facts, i.e., the skill and ability of various employees, some of whom were not present at the arbitration proceeding. The instant matter was simply one of contract interpretation.

In fact, the court in *Smith* noted that processing the grievance of some employees regarding their seniority status necessarily derogates the seniority of other employees. In that situation, the court stated that "the union must fairly represent both groups of employees and may take a position in favor of one group only on the basis of an informed reasoned judgment as to the merits of the claims in terms of the language of the collective bargaining agreement (citations omitted)." *Smith, supra* at .....

As far as this record shows, the union in the instant action took its position honestly, in good faith and without hostility or arbitrary discrimination in the processing of the grievances of the "Boning Seventeen". Indeed, since the arbitrator indicated that ¶ G was clear and unambiguous, no parol evidence was allowed. There was therefore no breach of the union's duty of fair representation.

Furthermore, there has been no showing that the arbitration award was erroneous.

IT IS THEREFORE ORDERED that this Court's Order, entered on March 13, 1979, be and the same is, hereby confirmed.

DATED: May 15, 1979

PHILIP C. WILKINS
UNITED STATES
DISTRICT JUDGE